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June 30, 2004

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Re: **Pick & Choose NPRM, CC Docket Nos. 01-338, 98-147, 96-98**

Dear Ms. Dortch:

Sage Telecom, Inc. ("Sage") hereby submits the enclosed Declaration of James H. Sturges for the Commission's consideration in connection with the above-referenced dockets.

Please contact me if you have any questions regarding this filing.

Sincerely,

SAGE TELECOM, INC.

Robert W. McCausland
Vice President,
Regulatory Affairs

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

DECLARATION OF JAMES H. STURGES

I, James H. Sturges, state as follows:

1. I am Vice President, Network Services, for Sage Telecom, Inc. ("Sage") and have held this position since May of 2003. My business address is 805 Central Expressway South, Suite 100, Allen, Texas 75013-2789. At Sage, my responsibilities include management and engineering of Sage's network, including CLEC, IXC and ISP operations, and comprising ILEC-provided wholesale facilities as well as Sage owned/operated facilities. I oversee Sage's negotiations and business dealings with respect to facilities and services obtained from incumbent local exchange carriers ("ILECs"), including SBC Communications, Inc. ("SBC").

2. I have 28 years of experience in the telecommunications industry, including design and management of numerous service-provider networks. From 1998 to 2003, prior to my tenure at Sage, I was President and CEO of Packetup Corporation, a company specializing in network design and service-control software for service provider networks. I was the lead negotiator for Sage in connection with the region-wide Private Commercial Agreement for Local Wholesale Complete ("LWC Agreement") that Sage recently entered into with SBC.

3. The purpose of my declaration is to support the Federal Communications Commission's ("Commission's") tentative conclusion that modification of the current "pick and choose" rule will facilitate innovative commercial negotiations between ILECs and competitive local exchange carriers ("CLECs"). I base my support on my own knowledge and recent experience.

4. Sage is a CLEC serving primarily residential customers in areas of eleven (11) states in which SBC is the ILEC. A small percentage (less than 6%) of Sage's customers are very small businesses. The rest are residential customers. SBC has represented that Sage is the third largest CLEC operating in its territory in terms of the number of customer lines. A substantial majority of Sage's customers are in rural and suburban areas. Sage provides local exchange service, intraLATA toll service, interLATA long distance service and voice messaging service in its operating areas. Soon it will also begin operating as an ISP.

5. Up to the present (until the Effective Date of the LWC Agreement), Sage's business has relied solely on the UNE-P model for local loop and local switching capabilities, enhanced with Sage's own back-office, customer care and billing systems, and with certain intelligence-based feature applications which Sage operates on its own platforms interconnected with SBC UNE-P services and SS7 signaling. Without UNE-P or an acceptable substitute, Sage could not continue to operate, and its customers would be at risk of losing the competitive alternative that Sage provides.

6. On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued its *USTA II* decision, vacating the Commission rules pursuant to which UNE-P was offered.[1] This ruling placed in jeopardy the network platform which Sage had exclusively relied upon in order to serve its customers. Sage and SBC had been in conceptual discussions about a possible replacement for UNE-P for a number of months prior to the *USTA II* decision; however, the *USTA II* ruling added additional urgency to Sage's efforts to exit the UNE-P regime by negotiating a mutually agreeable private agreement that enables Sage to compete on a sustainable basis. After the *USTA II* decision was issued, several weeks of intensive negotiations resulted in a private commercial agreement between the parties.

7. Sage and SBC entered into these negotiations with the knowledge that since the passage of the Telecommunications Act of 1996 ("1996 Act") it had proven impossible for ILECs and CLECs to agree upon pricing or terms for many of the key unbundled elements defined therein, particularly with respect to UNE-P. Regulatory agencies, and indeed the courts, thus became intrinsic to the contract development process, and arbitration (or litigation) replaced negotiation as the means of achieving closure at nearly every step of the way. Nevertheless, SBC informed Sage that it was sincerely interested in continuing as a wholesale provider of services on acceptable terms, including region-wide pricing at levels that exceeded then-prevailing rates for UNEs. Sage responded that it would only voluntarily accept such increased pricing for loops and switching if SBC would agree to customize the agreement in other respects in accordance with Sage's business model, enabling Sage to deliver greater value to its own retail customers.

8. It would be impossible to accomplish these objectives of both the parties, which were a *sine qua non* of successful voluntary negotiations, if the resulting agreement were subject

[1] *United States Telecom. Ass'n v. F.C.C.,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). After a brief stay, the Court of Appeals issued its mandate on June 16, 2004, and the decision is now in effect.

to the "pick and choose" rule. The reason for this is obvious, in that SBC would not agree to enriching the value of its wholesale services (or, perhaps, even to continue offering them, after *USTA II*) unless it could simultaneously achieve what it considered a fair price. Clearly, "pick and choose" would put this principle at risk.

9. Perhaps less obvious, but also germane to the pricing analysis, is the long-term commitment made by both parties to the LWC Agreement, which provides stability of the demand by Sage for wholesale services of SBC, and an environment conducive to investment by both parties in systems and processes to improve operating efficiencies at all levels of inter-company operations as well as end-user capabilities for Sage's customers. This long-term stability, which is already enabling Sage to prepare for additional investments in technology to improve our services, was immediately attacked by competing CLECs in various states as not facilitating their own ideas of technology investment—a stark example of how "pick and choose" can hinder technological innovation.

10. Sage and SBC recognized that the parties to a private commercial agreement that includes provisions not required by Sections 251 and 252 of the 1996 Act, and which is therefore not subject to "pick and choose" rule, can negotiate customized terms to help bridge the price gap between them by providing additional value to Sage, taking into account Sage's unique business model. In fact, the Commission recently and unanimously recognized that commercial agreements are "needed now more than ever" and that such agreements are in the "best interests of America's telephone consumers ..."[2] Within days after this announcement by the Commission, Sage and SBC followed the Commission's advice and entered into the LWC Agreement.

11. The negotiations between Sage and SBC led to business arrangements that fall within the scope of Section 251 (such as reciprocal compensation provisions and the rates, terms and conditions for access to unbundled loops) and business arrangements that are not related to Section 251, such as provisions for establishing a replacement arrangement for UNE-P (hereinafter referred to as "non-251 arrangements"). Sage believes that non-251 arrangements are not subject to the filing and state approval requirements set forth in Sections 251 and 252, and are likewise not subject to the "pick and choose" requirements contained in Section 252(i). This position, which is currently being challenged in certain states by Sage's competitors, provided the necessary foundation for our successful negotiation of the nation's first voluntary agreement to replace UNE-P.

12. Like any private commercial agreement negotiated between unaffiliated business firms, the LWC Agreement reflects a series of tradeoffs that embody concessions made by both parties. If the fruits of such concessions received by one party were required by "pick and choose" to be offered to others without the full panoply of tradeoffs embodied in the agreement as a whole, then such concessions would clearly never be made in the first place, particularly by the ILEC negotiating party. Recent industry history has shown that

[2] FCC News Release, March 31, 2004.

this would result in an irresolvable pricing standoff, and voluntary agreements such as the LWC agreement between Sage and SBC could never be achieved.

13. By negotiating under the belief that our LWC agreement is exempt from "pick and choose" requirements, Sage and SBC were able to fundamentally change the dynamic of negotiation. Instead of focusing on ***price*** alone, we were able to add to our negotiation the crucial dimension of ***value***. By customizing certain terms and conditions for Sage, while restricting these voluntary concessions in certain respects in ways that Sage could accept (including Sage's commitment to retain SBC as its preferred network provider), SBC was able to offer a wholesale product of greater value to Sage than the UNE-P platform Sage is moving away from. Accordingly, the somewhat higher price to be paid by Sage for LWC technology packages as compared with UNE-P is justified by the additional value we will be able to deliver to our customers and the additional revenues that will result.

14. The LWC Agreement clearly provides certain benefits for SBC in addition to pricing considerations, such as the commitment by Sage to continue its program of error-free automation of the order flow to SBC, resulting in cost savings for the ILEC, and Sage's ongoing programs to ensure stability of its customer base, which also reduces the support costs incurred by SBC. Similarly, Sage also benefits from SBC's commitment to these programs. This illustrates how if "pick and choose" were applied to detach any specific sections from the overall agreement, it could have the effect of undermining the economic basis used to establish the pricing.

15. Like any private commercial agreement negotiated between unaffiliated firms, the LWC Agreement reflects a series of tradeoffs that embody concessions made by both parties. In addition, as is the case with many private commercial agreements (in any industry) that are specifically tailored to address the business needs of the two negotiating parties, the LWC Agreement contains highly confidential information about Sage's future business strategies and plans. No business would deem disclosure of such information to its competitors acceptable, and Sage is no exception. Accordingly, the Agreement requires both parties to use their best efforts to maintain the confidentiality of such terms. "Pick and choose" would undermine this objective.

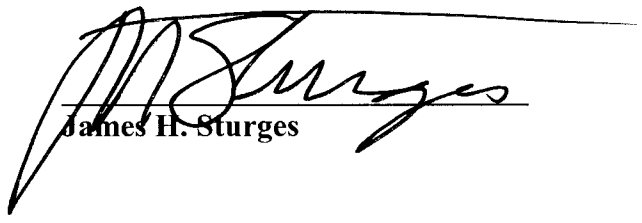
16. In May, 2004, SBC and Sage filed an interconnection agreement amendment that addresses all of the Section 251-related provisions of our agreement with the various state commissions. We are currently awaiting approval of the amendment. Unfortunately, the reaction to our announcement of the LWC Agreement has led to SBC and Sage becoming embroiled in time-consuming, expensive litigation in almost all of the relevant states. Although Sage and SBC have made public the vast majority of the LWC Agreement, keeping confidential only the most highly sensitive and confidential portions, other CLECs have sought to force public disclosure of the entire Agreement against the wishes of the negotiating parties.

17. In ¶ 8 of the NPRM, the Commission noted that: "We agree with commenters that, as the Commission implements a granular analysis under which some network elements will no longer be available on an unbundled basis in all markets, it will be especially

important for the Commission 'to provide market-based incentives for incumbents and CLECs to negotiate innovative commercial alternatives to the UNE platform' and other network elements and interconnection arrangements." Based on my experience in serving as the lead negotiator for Sage of what I understand to be the first such agreement, involving "innovative commercial alternatives to the UNE platform," I agree wholeheartedly with this statement. The "pick and choose rule" in its present form, if applicable, would have a chilling effect on commercial agreement negotiations and on the market-based purposes of the 1996 Act. In fact, negotiating under the belief that the rule was not applicable was a necessity for the successful completion of the Sage-SBC agreement. Because of our belief that the non-251 aspects of the LWC were not negotiated under the auspices of Section 251 and did not purport to implement any ongoing Section 251 obligation, Sage and SBC were able to make trade-offs that would have been unavailable were these provisions subject to the Commission's "pick and choose rule." These were precisely the trade-offs that were necessary in order for both parties to voluntarily bridge the previously intractable gap in pricing objectives between ILECs and CLECs in the UNE-P world. I believe that the "pick and choose" rule, where applicable, results in an increased reluctance by ILECs to enter into business arrangements that may be mutually beneficial to both ILEC and CLEC, as well as the general public. I believe the rule inevitably results in the ILECs holding back as much as possible on potential enhancements of functionality and cooperation, and in "lowest common denominator" and "one-size-fits-all" agreements wherein, simply put, Sage could never recognize the value necessary to justify pricing terms acceptable to SBC.

18. Furthermore, the prospect of a carrier's highly confidential information being disclosed to its competitors offers yet another illustration of how the "pick and choose" rule can stifle negotiations and impede innovation. If private, commercial non-251 business arrangements were required to be publicly filed (in particular, so that other CLECs can exercise their alleged "pick and choose" rights), then the whole premise of voluntary and private commercial negotiations would be undermined. This would be contrary to the Commission's request that ILECs and CLECs conduct commercial negotiations, and would have detrimental effects extending all the way to the consumer.

Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: June 30, 2004.



James H. Sturges